OREGON NATURAL DESERT ASSOCIATION

IBLA 96-325 Decided June 11, 1996

Appeal from, and request for stay of, a decision of the Central Oregon Resource Area Manager, Prineville, Oregon, District Office, Bureau of Land Management, approving agricultural irrigation of fields included in the Sutton Mountain Coordinated Resources Management Plan and Environmental Assessment. EA OR-054-2-044.

Stay denied.

1. Rules of Practice: Appeals: Stay

A dispute whether state law governing water rights acquired by BLM during a land exchange requires or permits allocation of the water to continued agricultural irrigation does not provide a foundation for issuance of a stay when the party seeking such relief fails to show that a stay would effectively preserve the rights of the contending parties pending appeal.

APPEARANCES: Harold S. Shepherd, Esq., Portland, Oregon, for appellant Oregon Natural Desert Association.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Oregon Natural Desert Association (ONDA) has appealed from a February 21, 1996, decision issued by the Central Oregon Resource Area Manager, Prineville District Office, Bureau of Land Management (BLM). The BLM decision approved the Sutton Mountain Coordinated Resource Management Plan, which included, among actions planned to be taken, irrigation of 12 agricultural fields within the Sutton Mountain planning area. This action was approved after a finding of no significant impact was made based upon environmental assessment OR-054-2-044. See BLM Decision at 1, 9, 13-15, 35. The decision provides, concerning the 12-field irrigation plan, that:

> The 92 Acre, Eighteen Acre, Unsworth, Priest Hole and John Day River agricultural fields will continue to be leased for irrigated crop production. In addition, the Connelly field will be available for irrigated crop production, beginning in 1996. * * * The agricultural fields not leased will be treated to

> control noxious weed infestations and planted to a perennial vegetation mix * * *. In addition, the unleased agriculturalfields could be leased to private groups under a cooperative agreement to both control weeds and enhance habitat a supply for certain wildlife species. [Internal references deleted.]

(Decision at 9, 13).

ONDA filed a timely notice of appeal of 14 subject areas included in the BLM decision; concerning BLM's decision concerning water rights, ONDA has requested a stay for the duration of the appeal, pursuant to 43 CFR 4.21, of that part of BLM's plan for the Sutton Mountain planning area authorizing agricultural irrigation of the 12 fields described above. Contending the public interest favors stay issuance because there exists a likelihood ONDA will succeed on the merits of this appeal, ONDA concludes there is a prospect of immediate and irreparable harm to the Sutton Mountain planning area if a stay of the irrigation proposal is not granted, and that consideration of potential relative harm to the parties favors issuance of a stay of this aspect of the BLM decision. ONDA's argument conforms to a four-part test contained in the stay regulation that sets standards for stay issuance by this Board. See 43 CFR 4.21(b).

This decision deals only with the question whether a stay of the irrigation provision of BLM's decision should be issued; we deny the request for stay, finding ONDA has failed to carry the burden assigned by the Department's rule to those seeking to obtain such relief. See 43 CFR 4.21(b)(2).

The stay request takes the position that irrigated agricultural use of the 12 fields at issue is inconsistent with planning for the Sutton Mountain area as a whole; ONDA argues that the primary use for this land should be "fishing, camping, nature study, hiking, wilderness solitude and other recreational and aesthetic pursuits" (Stay Request at 3). It is explained that:

> If the stay request is not granted * * * BLM could continue to apply up to 4.83 cfs from the John Day River and the Bridge Creek tributary to five agricultural fields and immediately begin to apply up to another 4.84 cfs from Bridge Creek and the Gable Creek Tributary to seven additional agricultural fields pending appeal. * * * This would further contribute to lethal increases in water temperature which are common in the affected water bodies during the irrigation season, * * * resulting in negative impacts to critical anadromous fish spawning habitat and other fisheries. * * * Rather than transferring the Sutton Mountain planning area water rights to instream use for the protection of water quality and fish habitat, the BLM's decision violates federal and state laws by appropriating such rights for irrigation. Data from both federal and state agencies show that,

> with the BLM currently appropriating water for less than half of the fields to be irrigated under the decision, water temperatures in the John Day River and its tributaries already violate the state water quality standard of 64º F for temperature.

Id. at 3, 4.

Pursuing this argument, ONDA argues that BLM's decision to permit agricultural irrigation in the planning area threatens chinook salmon, summer steelhead, redband trout, and Pacific lamprey fisheries in the John Day River and affected tributaries by contributing to raised temperatures in the waters. It is said that "BLM's decision will likely contribute to the need to list these species under the [Endangered Species Act] and/or irreparably contribute to their permanent elimination from the affected water bodies" (Stay Request at 6). It is submitted that the planned irrigation is contrary to standards adopted by the BLM decision that require no action be taken to endanger "special status species" or that would be contrary to specified "habitat objectives" (Stay Request at 7).

BLM opposes the stay request, stating that issuance of a stay would operate to change the status quo by endangering continuance of state water rights appurtenant to acquired lands within the planning area. BLM denies an ONDA contention that these are "federal water rights"; instead, BLM argues, they are state water rights that were acquired under state law by BLM's predecessors in interest and acquired as part of estates obtained in exchange for transfers of Federal land. BLM concludes that state law governs the existence and administration of these water rights, and state law requires them to be used this year or forfeited (BLM Response at 2). As BLM explains it,

> this year will be the fifth year [the water rights in question] have not been used and under Oregon State Water Law 540.610, Abandonment of Water Rights, any water right not used for a beneficial use within five consecutive years may be filed on by another party to change the location of use. This could result in the loss of control of 4.84 cubic-feet-per-second (cfs) of water by the following year. Since the intended use, by both the BLM and ONDA, of the 4.84 cfs is for instream, this potential loss would be adverse to both parties. * * * This is a key point. The water that the BLM would "lose" would not be available instream for the benefit of fisheries, it would be available to a user junior * * * to the BLM. [Emphasis in original; footnote omitted.]

Id. at 2, 3.

BLM contends that the decision here under review will "improve instream flow" and will not, as contended by ONDA, result in harm to fisheries. BLM states that not all the water at issue will be used for agriculture, but that the decision allocates water as follows:

> (1) continue to lease five fields and the associated water rights to private individuals for irrigated crop production (92 Pasture, 18 Acre Field, Unsworth, Priest Hole and John Day River) with both cropping and irrigation stipulations, (2) the Connelly field and water right is scheduled to be used for the purpose of controlling weed infestations, (3) Water rights associated with the other six fields (Manning, Owens Fields, and Gable Creek) would be leased on short term instream leases before the completion of the 1996 irrigation season (October 1).

Id. at 4. The effect of this planned usage, BLM explains, will be that:

> The BLM has a legal right to remove 7.87 cfs of water from Bridge Creek. Under the decision, the BLM would remove 2.52 cfs for agricultural lease irrigation and up to 0.51 cfs for a weed control project. Thus, the BLM will be utilizing no more than 32% of its water rights for out of stream purposes. Therefore, instream flow could gain as much as 5.35 cfs.

Id. at 10.

Arguing that maintenance of existing water rights forms a critical part of BLM planning designed to improve aquatic habitats and watershed conditions, BLM urges that we deny the stay request filed by ONDA.

BLM also challenges the argument made by ONDA that the planned irrigation will raise water temperatures in affected streams, arguing that it will instead have a cooling effect, given the nature of the affected watershed and increased instream flow. BLM argues that ONDA has misconstrued temperature data and standards applicable to trout, salmon, and steelhead fisheries in the request for stay, and points to current water conditions indicating that 1996 will be "the best in the recent past, and stream temperature and steelhead migration and spawning will likely follow in suit." Id. at 11.

On May 20, 1996, ONDA filed a statement of reasons (SOR) in support of the appeal taken from the entire BLM decision; in pertinent part, the SOR takes issue with the interpretation of state water law advanced by BLM. As ONDA sees it, "Oregon water law * * * exempts water rights from abandonment when, as in this case, '[t]he holder of a water right is prohibited by law from using the water' ORS § 540.610(j)" (SOR at 8).

Both BLM and ONDA therefore agree that state law governs administration of the water rights proposed to be used on the 12 fields within the Sutton Mountain planning area. They disagree, however, concerning the application and effect of the law in this case: BLM is of the opinion that issuance of a stay would disturb the status quo and could result in loss of the water rights at issue and disruption of future management of

instream water; ONDA contends that exercise of the rights in the manner proposed by BLM is inconsistent with BLM's planning for the area, because

> the agency's contention that its inability to use its rights for irrigation would "prevent the instream leasing of water rights which would threaten the BLM's ability to retain the rights for future management of instream water...", * * * serves only to illustrate its interest in retaining such rights for irrigation purposes rather than a concern for protecting instream flows. This is because, while the BLM must use its water rights within the five year time period in order to obtain a temporary instream lease, no such requirement applies to the permanent conversion of such rights to instream flows. [Emphasis in original; citations omitted.]

This argument suggests that ONDA seeks to use the sought-after stay to coerce BLM to modify the plan for water right usage. It is ONDA's contention that all water rights, except for existing permits, should be converted to "permanent instream flows." See SOR at 9-14, 16.

The four-part test for stay issuance established by 43 CFR 4.21(b) restates standards generally followed by the Federal courts in deciding whether to grant preliminary injunctive relief. See Jan Wroncy, 124 IBLA 150, 152 (1992); Marathon Oil Co., 90 IBLA 236, 245, 246 (1986). The four-part test applied to determine whether to grant injunctive relief, as the court observed in Natural Resources Defense Council v. E.P.A., 806 F. Supp. 275, 277 (D.D.C. 1992), "is not a wooden one, for * * * relief may be granted 'with either a high probability of success and some injury, or vice versa.'" We apply the four-part test in deciding whether to issue a stay in this case. 43 CFR 4.21(b).

Such an order as ONDA seeks has been described as "interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, and characterized by its for-the-time-beingness." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). It may be seen as an "equitable policing measure" designed to "keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." Id. at 742. The principal use of this type of remedy is to preserve the status quo to "prevent the judicial process from being rendered futile by defendant's action or refusal to act." Puerto Rico Conservation Foundation v. Larson, 797 F. Supp. 1066, 1070 (D. Puerto Rico 1992), quoting 11 Wright & Miller, Federal Practice and Procedure, Civil § 2947 at 146 (Supp. 1991).

[1] It is not clear that the stay sought by ONDA would have such a stabilizing effect, were it to be granted in this case. The purpose that ONDA seeks to advance is to commit the state water rights owned by BLM that are not presently leased or permitted to instream flow. This purpose underlies an assumption, quoted above, that such use will ultimately be shown to be required during planning for the Sutton Mountain area water

rights. While ONDA contends that harm will otherwise result to the fishery, arguments based upon past observations of water quality fail to show any such harm is presently threatened by BLM's planned use of water rights on the 12 fields at issue; ONDA has, therefore, not complied with the requirement that it demonstrate there is a likelihood of immediate and irreparable harm. 43 CFR 4.21(b)(iii).

The record before us also fails to support ONDA's contention that there is a likelihood ONDA will prevail on the question whether more water should be allocated to instream use in the vicinity of the 12 fields; BLM's analysis of the legal status and potential environmental effect of the proposed use of its state water rights on fisheries is plausible on its face; ONDA has not shown that the planned use threatens to harm the fisheries, or that it will raise temperature levels in the affected waters. While ONDA disagrees with both the legal and factual analysis provided by BLM, it has not shown error in BLM's allocation of state water rights. The argument that allocation of water rights for any agricultural use over that presently permitted violates agreed water standards is not supported by data directly relating to the proposed action; ONDA has failed to provide a factual foundation to support the conclusion urged as grounds for stay issuance. As a result, there is, on the record now before us, no showing that ONDA meets the principal standard for stay issuance: ONDA has not shown a likelihood of success on the merits of the water rights question. See 43 CFR 4.21(b)(ii).

Certainly there has been no showing that the relative harm to ONDA if a stay is denied in this case will be greater than the harm envisioned by BLM if a stay is granted. It is quite possible, as BLM suggests, that issuance of a stay might cause the water rights at issue to be lost to a junior private party, to the detriment of the ONDA, BLM, and the public at large. While ONDA denies that BLM has correctly analyzed this issue, it has not been shown that, given the facts of this case, the BLM position is in error. ONDA has failed to establish there exists a situation where, on balance, denial of a stay would work a greater hardship on ONDA than would otherwise be the case. See 43 CFR 4.21(b)(i).

Nor has ONDA shown that the public interest favors granting a stay for the limited purpose of restricting BLM's ability to manage the state water rights presently held by the agency. The argument that past water quality and temperature deficits should inhibit BLM planning for the fields here at issue depends upon acceptance of the ultimate goals urged by ONDA for the Sutton Mountain planning area. As ONDA explains it, "any reduction of instream flows through the irrigation of agricultural lands in the Sutton Mountain planning area would violate this [agreed upon] standard, since habitat for summer steelhead and other aquatic species in the planning [area] already violate [such standards]." (Emphasis in original.) Assuming that the cited water standards apply in this case, it remains to be shown that they forbid "any reduction of instream flows." If that does prove to be the case, ONDA has yet to show how the action proposed to be taken by BLM during 1996 will be more than temporary in effect. In any

event, a connection between the proposed action and the cited standards for water quality has yet to be made. Nor has it been shown that use of the water rights as proposed is contrary to the Sutton Mountain plan, so as to contradict policy established by the plan itself. Altogether, therefore, it has not been shown that the public interest requires issuance of a stay in this case. See 43 CFR 4.21(b)(iv).

The stay petition presented by ONDA is not sufficient to support issuance of a stay that would operate to inhibit BLM management of acquired water rights in the planning area; ONDA has failed to carry the burden of proof imposed upon applicants for such relief by 43 CFR 4.21(b)(2). Moreover, the existence of a dispute concerning administration of the state water rights at issue indicates that issuance of a stay in this case might not operate to preserve the rights of the contending parties pending disposition of this appeal, but could result in loss of the rights altogether; under such circumstances a stay cannot issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for stay is denied.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge